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IN THE
Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, ET AL.,
Petitioners,

v.

EMPAGRAN, S.A., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE GOVERNMENTS OF THE FEDERAL REPUBLIC OF GERMANY AND BELGIUM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether plaintiffs may pursue Sherman Act claims seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce.

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CASES

United States

Goss Graphic Sys., Inc. v. Man Roland Druckmaschinen Aktiengesellschaft, 139 F. Supp. 2d 1040 (N.D. Iowa 2001) 28

Kruman v. Christie's Int'l PLC, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 124 S. Ct. 27 (2003) 16, 17

Lauritzen v. Larsen, 345 U.S. 571 (1953) 9

Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978) 4

Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976)..... 16

United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) 9

European Union

Gencor Ltd. v. Commission (Case T-102/96, 25.3.1999, E.C.R. 1999, Page II-00753) 9

TREATIES AND AGREEMENTS

Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, *reprinted at* 37 I.L.M. 1070 (1998) 17, 18

Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, 34 U.S.T. 388, T.I.A.S. No. 10365 25

Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291 25

Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325) 33 (2002), *available at* http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf 12

Memorandum of Understanding as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, United States-Canada, *reprinted at* 4 Trade Reg. Rep. ¶ 13,503 25

STATUTES AND RULES

<u>*United States*</u>

Anti-Dumping Act of 1916, 15 U.S.C. § 72 28

Clayton Act:

§ 4, 15 U.S.C. § 15 3

§ 16, 15 U.S.C. § 26 3

Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a 2, 3, 4, 5

Jones Act, 46 U.S.C. § 688 9

Sherman Act, § 1, 15 U.S.C. § 1 ..... 3, 13, 27

Sup. Ct. R. 37.6 1

<u>*Belgium*</u>

Act on the Protection of Economic Competition, *available at* http://www.mineco.fgov.be/homepull_en.htm 2, 3, 13, 14

<u>*Germany*</u>

Act Against Restraints of Competition, *available at* http://www.bundeskartellamt.de/competition_act.html 1, 8, 12, 14

LEGISLATIVE MATERIALS

Foreign Trade Antitrust Improvements Act: Hearing on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 21, 22, 23, 24

Foreign Trade Antitrust Improvements Act: Hearing on S. 795 Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 21

H.R. Rep. No. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487 ..... 20, 24

OTHER MATERIALS

IA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2000) 9, 11, 18, 25, 26

Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1 (1987) 26

Bundeskartellamt Report, *available at* http://www.bundeskartellamt.de/17_12_2003englisch.html 1

Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 Yale J. Int'l L. 219 (2001) 11, 15, 25

Ronald W. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15 Antitrust 53 (Sum. 2001) 19

Makan Delrahim, Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications, Speech Before the American Bar Association Section of Antitrust Law, Washington, D.C. (Nov. 18, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201509.htm 15, 17, 25

Michael L. Denger & D. Jarrett Arp, *Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, 15 Antitrust 41 (Sum. 2001) 30

Draft Parameters for the 7th Amendment to the Act Against Restraints of Competition, *available at* http://www.bmwa.bund.de 12

Dorsey D. Ellis, *Projecting the Long Arm of the Law: Extraterritorial Criminal Enforcement of U.S. Antitrust Laws in the Global Economy*, 1 Wash. U. Global Stud. L. Rev. 477 (2002) 8

European Comm'n, *Competition Policy in Europe and the Citizen* (2000), *available at* http://europa.eu.int/comm/competition/publications/competition_policy_and_the_citizen/en.pdf 19

European Union Press Release, *EU seeks retaliatory and protective measures in US 1916 Anti-Dumping Act dispute* (Sept. 22, 2003), *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1274|0|RAPID&lg=EN&display= 28

Federal Cartel Office, *Biennial Activity Report 2001/2002* (June 27, 2003), *available at* http://dip.bundestag.de/btd/15/012/1501226.pdf (German version only) 19, 29

Eleanor M. Fox, *International Antitrust and the DOHA Dome*, 43 Va. J. Int'l L. 911 (2003) 8

Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* (5th ed. 1996):

Vol. I 10, 27

Vol. II 12, 19

Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159 (1999) 10, 15, 17, 18

Andrew T. Guzman, *Choice of Law: New Foundations*, 90 Geo. L.J. 883 (2002) 18

H. Stephen Harris, *Competition Laws Outside the United States*, 2001 A.B.A. Sec. Antitrust L. 13 18

Jason Hoerner, *Competition Law in the European Union: A Dual Enforcement System, available at* http://www.antitrust.de/kartellrecht.htm 12

International Competition Policy Advisory Comm., *Final Report* (2000), *available at* http://www.usdoj.gov/atr/icpac/finalreport.htm 15, 29

Mark R. Joelson, *An International Antitrust Primer* (2d ed. 2001) 10, 11, 27

Roderick Lambert, *Parallel Antitrust Investigations: The Long Arm of the DOJ from the Perspective of an E.U. Defense Counsel*, 14 Loy. Consumer L. Rev. 509 (2002) 11, 12, 14, 19

Otto Graf Lambsdorff, Antitrust Law as a Regulatory Factor in a Globalized Market Economy, Lecture at the XI International Cartel Conference of the Federal Cartel Office, Bonn, Germany (May 20, 2003) 26

A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 Am. J. Int'l L. 257 (1981) 27

Official Journal of the European Communities, *Commission notice on immunity from fines and reduction of fines in cartel cases* (2002/C 45/03) 29

Organisation for Economic Co-operation and Development:

Committee on Int'l Investment and Multinat'l Enters., *The 1984 Review of 1976 OECD Declaration and Decisions on International Investment and Multinational Enterprises*, approved May 18, 1984, OECD Doc. Press/A(84) 7

Recommendation of the Council concerning Co-operation between Member Countries on Anti-competitive Practices affecting International Trade, approved July 27, 1995, OECD Doc. No. C(95)130/FINAL, *available at* http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/E4BEC576C7A50A2FC1256E2B00666FBA?OpenDocument 7

Recommendation of the Council concerning Effective Action Against Hard Core Cartels, approved March 25, 1998, OECD Doc. No. C(98)35/FINAL, *available at* http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/C1B5216D0B9825BCC1256E2B0066A158?OpenDocument 8

Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 Berkeley J. Int'l L. 44 (2001) 27

Rating Enforcement Survey, Global Competition Review, June 2003 1

Restatement (Third) of Foreign Relations Law of the United States (1987) 4-5, 6, 7, 8, 9, 26

Joachim Rudo, *The 1999 Amendments to the German Act Against Restraints of Competition, available at* http://www.antitrust.de/gwb-amendment.htm 12

J.S. Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 Cornell Int'l L.J. 195 (1978) 27

The Fight Against Cartels: Statistics, available at http://europa.eu.int/comm/competition/citizen/cartel_stats.html 2

Spencer W. Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 Loy. Consumer L. Rev. 523 (2002) 11

INTEREST OF *AMICI CURIAE*[1]

The Federal Republic of Germany has one of the world's most advanced and extensive legal regimes to protect against economic competition abuses. Under its Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* or *GWB*),[2] Germany prohibits "[a]greements between competing undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition." GWB § 1. That law "shall apply to all restraints on competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act." GWB § 130, ¶ 2. Germany's enforcement efforts and merger review procedures have been evaluated as being "at the top of the European rankings" and "second overall behind the US." *Rating Enforcement Survey*, Global Competition Review, June 2003, at 22. Since the beginning of 2003, the Federal Cartel Office (*Bundeskartellamt*) has levied more than €700 million in fines against companies and executives involved in cartels, conducted 7 significant raids of 199 companies and homes, and reviewed some 1,300 mergers. *See Bundeskartellamt Report, available at* http://www.bundeskartellamt.de/17_12_2003englisch.html. Such efforts have been recognized by the Organisation for Economic Co-operation and Development ("OECD") as sending a clear message about the importance of competition while permitting efficient cooperation.

As a Member State in the European Union ("EU"), Germany also provides political, economic, and enforcement

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that they authored this brief and that no entity other than *amici* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this *amicus* brief, and letters reflecting their consent have been filed with the Clerk.

[2] Both the original German version and the English translation of the GWB are available at http://www.bundeskartellamt.de/competition_act.html.

support for the EU's competition laws, which, in conjunction with Member States' national competition laws, operate as a dual enforcement system in Europe. Like Germany, the EU vigorously pursues cartels, levying €1.839 billion in fines during 2001 and €950 million during 2002. *See The Fight Against Cartels: Statistics, available at* http://europa.eu.int/comm/competition/citizen/cartel _stats.html.

Petitioners in this case include German companies that are alleged to have participated in an international cartel to fix prices and allocate markets for bulk vitamin sales. *See* Pet. 5. Germany participated in EU enforcement efforts that produced €855 million (approximately US$1 billion) in fines against companies that are petitioners in this case. Germany has significant economic and political interests in ensuring that companies acting within German markets comply with German and EU competition laws, and in protecting against the encroachment of other countries' laws on those enforcement efforts. Germany also has an interest in seeing that German companies are not subject to the extraterritorial reach of the United States' antitrust laws by private foreign plaintiffs – whose injuries were sustained in transactions entirely outside United States commerce – seeking treble damages in private lawsuits against German companies. Accordingly, Germany has a substantial interest in the proper construction of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA" or "Act"), 15 U.S.C. § 6a.

Belgium also is a Member State in the EU, is a member of the OECD, and supports the enforcement efforts of the European Commission ("EC") and the EU's competition laws. Belgium likewise has its own competition enforcement regime. Its Act on the Protection of Economic Competition ("Belgian Act")[3] prohibits "agreements between undertakings . . . and concerted practices whose object or

[3] The English translation of the Belgian Act is available at http://www.mineco.fgov.be/homepull_en.htm.

effect is to significantly prevent, restrain or distort competition in the Belgian market concerned or in a substantial part of it." Belgian Act Art. 2, § 1. The Belgian Act also prohibits "[a]ny abuse of a dominant position in the Belgian market concerned or in a substantial part of it by one or more undertakings." *Id.*, Art. 3. And the Act provides for EU enforcement where unlawful restraints on trade fall within the jurisdiction of the EC. *Id.*, Art. 13.

Belgium has a substantial interest in ensuring that companies acting within Belgium and the EU comply with Belgian and EU competition laws, and ensuring that U.S. antitrust laws and the availability of civil damages actions in U.S. courts do not interfere with Belgian and EU enforcement efforts. Belgium therefore has a substantial interest in the proper construction of the FTAIA.

STATEMENT

Petitioners are foreign and domestic manufacturers and distributors of vitamins. Respondents are foreign corporations domiciled in foreign countries that purchased vitamins from petitioners in foreign markets. Respondents' class action alleges that petitioners conspired to fix prices and allocate market share in violation of the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. §§ 15 and 26.

The district court dismissed respondents' federal antitrust claims for lack of subject-matter jurisdiction. Pet. App. 46a. The court noted that the "critical question in this case is whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws." *Id.* at 48a. That question required the court to consider a provision of the FTAIA, 15 U.S.C. § 6a, which provides that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect . . . on trade or commerce," and "such effect gives rise to a claim under

the provisions of sections 1 to 7 of this title." Pet. App. 48a (quoting 15 U.S.C. § 6a). The district court concluded that, because respondents had purchased vitamins solely in foreign markets, they had "not alleged that the precise injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction over this case." *Id.* at 49a.

Respondents appealed. They contended that the FTAIA does not restrict jurisdiction to the same claim on which the jurisdictional effects are based. The court of appeals agreed and reversed, holding that, "where the anticompetitive conduct has the requisite harm on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce." *Id.* at 4a. The court opined that it is sufficient for jurisdiction if the conduct "give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." *Id.* In so ruling, the court relied on a "literal reading of the statute," as well as the FTAIA's legislative history and "underlying policies of deterrence" that it gleaned from *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978). Pet. App. 4a.

SUMMARY OF ARGUMENT

The court of appeals' decision incorrectly interprets the FTAIA in a manner that will do grave harm to the antitrust enforcement efforts of the international community. The court's interpretation drastically expands the extraterritorial reach of the United States' antitrust laws to situations in which the conduct and the alleged anticompetitive effects suffered by foreign plaintiffs occur only in foreign countries. Yet, in those situations, other nations have a significant interest in the transaction and its effects and have jurisdiction to regulate or prohibit that conduct. The court's holding thus directly conflicts with the well-established principle that United States statutes are to be construed to avoid conflict with other nations' laws and to avoid unreasonableness in the exercise of U.S. courts' jurisdiction. *See Restatement (Third) of Foreign Relations Law of the United States* § 403 cmt. g, at 248 (1987) ("*Restatement (Third)*").

The court of appeals' expansive interpretation of the United States' antitrust laws will permit foreign civil litigants to use United States lawsuits to circumvent the choices made by foreign governments about the most appropriate remedies available for anticompetitive behavior. The court's interpretation of the FTAIA also threatens to undermine international antitrust cooperation and enforcement, contrary to the "underlying policies of deterrence" upon which the court relied. For example, foreign governments use leniency programs similar to the one utilized by the Department of Justice ("DOJ") to obtain information about violations; they then use that information to deter other abuses. Yet private suits, such as respondents', create strong disincentives for companies to participate in such programs because to do so increases the risk that the information they disclose to governments will subject them to private civil liability and treble damages.

The court of appeals failed to consider any of these factors. It failed to consider the well-settled principles of comity and respect for the sovereign choices of foreign nations that counsel in favor of a limited application of U.S. antitrust laws to extraterritorial effects. It failed to consider the negative impact that an expansive application of U.S. antitrust law could have on domestic and international cooperation and enforcement, including prompting retaliatory legislation in other countries. And it failed to consider the legislative history of the FTAIA, where Congress recognized all of these concerns as motivating the passage of this legislation. Accordingly, the court improperly interpreted Section 6a of the FTAIA to extend U.S. antitrust jurisdiction to the foreign conduct at issue. The court's decision should be reversed.

ARGUMENT

I. CONTRARY TO WELL-SETTLED PRINCIPLES OF LAW, THE COURT OF APPEALS' DECISION FAILED TO CONSIDER THE SUBSTANTIAL INTERESTS OTHER NATIONS HAVE IN THE REGULATION OF THEIR OWN INDUSTRIES AND COMMERCE

A. United States And International Laws Require Respect For The Jurisdiction Of Other States

Amici agree with petitioners that federal court subject-matter jurisdiction does not exist in this case under the "effects" test, the FTAIA, or any other doctrine, because the particular conduct and purchases of vitamins at issue here occurred solely in foreign commerce. Even if jurisdiction could be found under existing effects doctrine, however, principles of both United States and international law require that nations consider the sovereign interests of other countries before exercising their jurisdiction extraterritorially. The court of appeals did not address these principles, let alone accord proper deference to the interests of those nations most directly affected by the conduct and transactions that are alleged to have caused these foreign respondents' injuries.

The court of appeals' conclusion that jurisdiction exists in this case is contrary to United States law, which recognizes that, "[w]here regulation of transnational activity is based on its effects in the territory of the regulating state, the principle of reasonableness calls for limiting the exercise of jurisdiction so as to minimize conflict with the jurisdiction of other states, particularly with the state where the act takes place." *Restatement (Third)* § 403 reporter's note, at 250. This principle informs the proper method of construing statutes such as the FTAIA. *See id.* cmt. a, at 245 ("courts have usually interpreted general language in a statute as not intended to exercise or authorize the exercise of jurisdiction in circumstances where application of the statute would be unreasonable"); *id.* cmt. g, at 248 ("if one construction of a United States statute would bring it

in conflict with the law of another state that has a clearly greater interest, . . . while another construction would avoid such a conflict, the latter construction is clearly preferred, if fairly possible").

The principle of judicial restraint and reasonableness is well recognized under U.S. law. The *Restatement (Third)* observes that, "[e]ven when one of the bases for jurisdiction . . . is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." *Id.* § 403(1), at 244. Among the factors bearing upon the reasonableness of exercising jurisdiction are "the extent to which other states regulate such activities," § 403(2)(c); "the extent to which another state may have an interest in regulating the activity," § 403(2)(g); and "the likelihood of conflict with regulation by another state," § 403(2)(h). As is demonstrated below, the exercise of U.S. jurisdiction over transactions and injuries that occurred solely in foreign commerce would be an unreasonable interpretation and application of the FTAIA.

International law similarly requires respect for other nations' interests. For example, the OECD urges its members to "take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries," and calls for "cooperation as an alternative to unilateral action." OECD, Committee on Int'l Investment and Multinat'l Enters., *The 1984 Review of 1976 OECD Declaration and Decisions on International Investment and Multinational Enterprises*, approved May 18, 1984, OECD Doc. Press/A(84). More recently, the OECD has recommended that its members recognize "the need . . . to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation on the field of anticompetitive practices." *Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade*, approved July 27, 1995, OECD Doc. No. C(95)130/Final.

B. General Principles Of Comity And Respect For Foreign Sovereignty Interests Also Apply To United States Antitrust Enforcement And Jurisdiction Under The "Effects" Test

These general principles of jurisdictional law apply to antitrust regulation.[4] Other nations share common ground with the United States in applying the effects doctrine, which has been accepted in "most of the world." Eleanor M. Fox, *International Antitrust and the DOHA Dome*, 43 Va. J. Int'l L. 911, 916 (2003). *See also Restatement (Third)* § 403 reporter's note, at 250 (observing that "[m]ost other states of Western Europe . . . have accepted the effects doctrine as applied to economic effects, either in their legislation or in political decisions"). Germany's competition law, for example, provides that it "shall apply to all restraints on competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act." GWB § 130, ¶ 2. Indeed, "Germany appears to have been foremost among the member states of the [European Community] to embrace extraterritoriality." Dorsey D. Ellis, *Projecting the Long Arm of the Law: Extraterritorial Criminal Enforcement of U.S. Antitrust Laws in the Global Economy*, 1 Wash. U. Global Stud. L. Rev. 477, 501 (2002). The EU, too, has adopted the effects doctrine, as "both the Commission and the Court of Justice of the European Community have applied Community law to enterprises not engaged in business in the Community, on the basis of the effect of

[4] For instance, the OECD has stated that its members "should co-operate with each other in enforcing their laws against [hard core] cartels" and "should conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests." *Recommendation of the Council concerning Effective Action Against Hard Core Cartels*, approved March 25, 1998, OECD Doc. No. C(98)35/FINAL. Consistent with these comity principles, "a Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests." *Id.*

restrictive practices within the Community." *Restatement (Third)* § 415 reporter's note, at 294. *See also Gencor Ltd. v. Commission* (Case T-102/96, 25.3.1999, E.C.R. 1999, Page II-00753) (EC's regulation of competition "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community").

In applying the effects test, United States courts properly have exercised discretion when an expansive application of U.S. law would intrude on the interests of foreign sovereigns that also are seeking to enforce their own competition laws against the very same companies. *See* IA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272d, at 353 (2d ed. 2000). Thus, even where foreign conduct has been determined to have some effect on American commerce, that does not compel the conclusion that United States jurisdiction is proper – "the court may wish for reasons of prudence, policy, comity, or economy not to proceed further." *Id.* ¶ 273c, at 374. As Judge Learned Hand explained the inquiry under the "effects" test, United States jurisdiction should be invoked with "regard to the limitations customarily observed by nations upon the exercise of their powers." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945). *See also Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953) (construing Jones Act "to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law").

Consideration of other nations' interests counsels against an exercise of U.S. jurisdiction in this case. The most important factors – primacy over a given transaction, the locus of the conduct, the locus of that conduct's effects, and the strength of the foreign state's policies that bear on the problem – all point to countries *other than* the United States as the proper forum for these disputes. *See* IA Areeda & Hovenkamp, *supra*, ¶ 276, at 413. The foreign respondents' purchases of vitamins in foreign commerce do not give the U.S. primacy over those transactions.

Countries such as Germany are in general accord with United States law in limiting enforcement of competition laws only to those foreign actions that have effects in Germany. Conversely, rulings by United States courts that expand the effects doctrine and thereby apply the United States' antitrust laws to foreign nationals and foreign conduct have rightly been criticized "on grounds of foreign relations, international law or comity, often by the U.S.'s closest allies." Mark R. Joelson, *An International Antitrust Primer* 54 (2d ed. 2001). *See also* I Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* § 2.16, at 126-27 & n.2 (5th ed. 1996) (cataloguing cases where foreign governments have protested and disputed "the jurisdiction of United States courts over their nationals or over the activities of their nationals outside of the territorial boundaries of the United States"); Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 159 (1999) ("aggressive unilateral enforcement continues to provoke conflicts among close trading partners and to create uncertainty for transnational firms").

C. The Court Of Appeals Failed To Respect The Legitimate Choices Other Nations Have Made That Reject Certain Aspects Of The United States' Antitrust Laws

The court of appeals' application of the United States' antitrust laws to foreign plaintiffs that purchased vitamins exclusively in foreign commerce interferes with the sovereign interests of other nations. The court failed to give proper consideration to the legitimate choices those nations have made concerning the regulation of their own commerce and competition in their own markets. It failed to recognize, too, that there often are "important differences between domestic and international markets in . . . the environmental circumstances bearing upon the 'reasonableness' of a given restraint" on trade. IA Areeda & Hovenkamp, *supra*, ¶ 273, at 372.[5]

Some of those differences between the United States' and other nations' legal systems are well known. Like many other countries, for example, neither Germany nor Belgium provides for trebling of private antitrust damages awards. *See* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 Yale J. Int'l L. 219, 251 (2001) (treble damages are "one of the most unacceptable aspects of U.S. regulatory law"); *see also* Pet. 23.

Other controversial features of the U.S. legal system include extensive discovery, jury trials, class actions, contingent fees, and punitive damages. *See* Spencer W. Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 Loy. Consumer L. Rev. 523, 532 (2002); Joelson, *supra*, at 6 ("treble damage awards, contingency fees, and class action procedures . . . have little support elsewhere"). Furthermore, the "Court of Justice has emphasized that [EU competition law] is not the same as the Sherman Act in that there are no per se violations" under EU law. Lambert, *supra*, 14 Loy. Consumer L. Rev. at 519.

In addition to the foregoing characteristics that differentiate the U.S. legal system from those of other countries, Germany, Belgium, and the EU approach competition law in certain respects in a manner different from the United States. Compared to the United States, for example, the German system sets a different balance between the civil and administrative punishment of violations of competition law. While in Germany private parties can also claim

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[5] "If the U.S. courts permit forum-shopping by foreign entities where the dispute has little causal connection with the U.S., then that can only operate to the detriment of other antitrust enforcement systems which may take a different view on matters such as treble damages and contingency fees." Roderick Lambert, *Parallel Antitrust Investigations: The Long Arm of the DOJ from the Perspective of an E.U. Defense Counsel*, 14 Loy. Consumer L. Rev. 509, 512 (2002).

damages, *see* GWB § 33, Germany's focus in obtaining the desired deterrent effect of illegal restraints of trade is on prosecution through its competition authorities. *See* Jason Hoerner, *Competition Law in the European Union: A Dual Enforcement System*, *available at* http://www.antitrust.de/kartellrecht.htm.

Moreover, apart from the prohibition on hard-core cartels, which are prohibited almost universally, there is less certainty in how competition policy should treat grey areas of cooperation between competitors. *See* II Fugate, *supra*, § 16.9, at 566 (noting that Germany exempts "particular types of cartels such as rationalization cartels organized to take advantage of technical improvements in an industry."). Germany exempts certain agreements that "contribute to improving the development, production, distribution, procurement, recycling or waste disposal of goods, while allowing consumers a fair share of the resulting benefit." Joachim Rudo, *The 1999 Amendments to the German Act Against Restraints of Competition*, *available at* http://www.antitrust.de/gwb-amendment.htm.[6]

[6] The German law follows the EU model, which provides a similar exemption for an agreement that "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit." Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, Art. 81(3), O.J. (C 325) 33, 64-65 (2002) (formerly Article 85 of the Treaty of Rome), *available at* http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf. About this exemption it has been remarked that, "[w]hen compared to the Department of Justice, the Commission clearly has a much broader administrative role in antitrust matters (for example through the granting of exemptions under Article 81(3))." Lambert, *supra*, 14 Loy. Consumer L. Rev. at 519. Effective May 1, 2004, Germany also will change its laws concerning exemptions for agreements with transnational effects to provide that such agreements will in the future be assessed under Article 81. *See* Draft Parameters for the 7th Amendment to the Act Against Restraints of Competition, *available at* http://www.bmwa.bund.de (German version only).

In Belgium, although private claims for damages are available in civil courts, the Belgian competition regime primarily utilizes a number of administrative and enforcement bodies to investigate and prosecute violations of the Belgian Act, including: the Competition Service, a unit of the Federal Public Service Economy responsible for detecting and noting the existence of restrictive practices and carrying out investigations of those; the Corps of Rapporteurs, which organizes investigations and the agents performing them and issues the investigation report; and the Competition Council, an administrative court comprised of judicial magistrates and experts in competition with the authority to make decisions and advance proposals and opinions. And, like Germany and the EU, the Belgian Act permits exemption of agreements "which contribute to improving production or distribution or to promoting technical or economic progress or which allow small and medium-sized undertakings to strengthen their competitive position in the market concerned or in the international market," so long as those agreements "provid[e] users with a fair share of the profit resulting therefrom" and do not "eliminate competition for a substantial part of the products concerned." Belgian Act Art. 2, § 3.

The United States' antitrust laws do not necessarily recognize similar exemptions from criminal prosecution under the Sherman Act, let alone from suits by private plaintiffs who allege that they were injured by the foreign anticompetitive effects of such cartels. By applying the United States' antitrust laws in cases where neither the plaintiff nor the alleged harm has direct effects on United States commerce, the court of appeals' decision fails to respect the fundamental right of foreign sovereigns to regulate their own markets and industries.

That is not to say that German, Belgian, or EU enforcement is any less vigorous than American efforts. In some ways, these competition laws are stricter than

United States law;[7] in other ways, less strict. Hard-core cartels like the one charged in the vitamin cases are illegal and subject to vigorous prosecution in both countries and in the EU, where substantial penalties already have been assessed against companies that include petitioners. And, in most cases, the results of enforcement efforts in the United States, on the one hand, and in Germany, Belgium, and the EU, on the other, are similar.

However, the theory and application of the competition laws of Belgium, Germany, the EU, and the U.S. differ in important ways. For example, in the U.S., agency practice and courts decide whether certain agreements restraining competition are illegal by applying a "rule of reason" analysis. By contrast, German law provides for a very broad-reaching prohibition of agreements between competitors (GWB § 1), with enumerated exceptions (GWB §§ 2-8). So, too, for the Belgian regime, which prohibits cartels under the Belgian Act, Article 2, § 1, and then provides for exemptions under Article 2, § 3.

Sometimes those varying approaches may result in different decisions as to the method of enforcement or whether a prohibition is appropriate at all. And, irrespective of whether a different outcome may result under the various systems, U.S. law should not trump Germany's and Belgium's sovereign rights to make their own choices about how to structure and apply their competition laws in determining liability and imposing remedies.

For this reason, permitting suits such as respondents' encroaches directly on contrary sovereign choices made by other countries. German, Belgian, and European laws treat the vitamin case as a hard-core cartel that cannot be subject to an individual exemption. Germany, Belgium, and other EU Member States should be given the freedom

[7] *See, e.g.*, Lambert, *supra*, 14 Loy. Consumer L. Rev. at 519 (noting that the EU's "Article 81 is of wider ambit than Section 1 of the Sherman Act and can catch conduct, which involves a lesser degree of culpability than its U.S. counterpart").

to impose different remedies than those that would be imposed under the U.S. system. And the EC has, in fact, already imposed considerable fines on account of the vitamin cartel's effects in Germany and other EU Member States.

Other branches of the U.S. government have expressed sensitivity to those concerns. The U.S. Deputy Assistant Attorney General for Antitrust has recognized that "the United States is not alone in today's antitrust world; we are joined by nearly 100 other jurisdictions, many of them with effective court systems, and as they have considered their system of enforcement, some have found it fit, as a matter of domestic policy, to provide for certain private rights of action and some have not." Makan Delrahim, Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications, Speech Before the American Bar Association Section of Antitrust Law, Washington, D.C. (Nov. 18, 2003), at 7, *available at* http://www.usdoj.gov/atr/public/speeches/201509.htm. The court of appeals' decision effectively trumps this sensitivity and the balance in the Executive Branch's approach by expanding U.S. jurisdiction without consideration of other countries' interests.

Indeed, it is especially intrusive on other nations' interests that the court of appeals' decision opens the door to private foreign plaintiffs who seek treble damages, as opposed to opening the door simply for DOJ enforcement. Private plaintiffs rarely exercise the type of self-restraint or demonstrate the requisite sensitivity to the concerns of foreign governments that mark actions brought by the United States government. *See* Griffin, *supra*, 67 Antitrust L.J. at 194. *See also* International Competition Policy Advisory Committee, *Final Report* 246 (2000) (observing that, "while the U.S. Department of Justice considers principles of comity before considering whether to bring an enforcement action, private parties are not bound by such strictures"), *available at* http://www.usdoj.gov/atr/icpac/finalreport.htm; Buxbaum, *supra*, 26 Yale J. Int'l L. at 253 (noting the concern that "private suits may be initiated in

situations in which the government had in fact considered enforcement, but after analyzing the competing interests involved had declined to act"); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976) (consideration of the international implications of the exercise of U.S. jurisdiction "is especially required in private suits . . . for in these cases there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been out-weighed").

II. FOREIGN VIOLATIONS OF ANTITRUST PRINCIPLES ARE SUFFICIENTLY REGULATED, INVESTIGATED, AND PUNISHED BY OTHER COUNTRIES' COMPETITION LAWS SO THAT APPLICATION OF UNITED STATES LAW TO EXTRATERRITORIAL EFFECTS IS UNNECESSARY TO PREVENT GLOBAL CONSPIRACIES

In analyzing deterrence issues, the court of appeals failed to consider the existence of effective competition enforcement regimes in other countries. The court justified its decision on the ground that "[d]isallowing suits by foreign purchasers injured by a global conspiracy because they themselves were not injured by the conspiracy's U.S. effects runs the risk of inadequately deterring global conspiracies that harm U.S. commerce." Pet. App. 32a. We respectfully submit that the court is gravely mistaken. Not only will the court's decision likely produce *less* effective deterrence of global conspiracies by hindering international cooperation, *see* Part IV, *infra*, but it also fails properly to recognize that other nations already have in place effective competition regulations and laws that adequately prohibit and deter global conspiracies affecting those nations' own commerce.[8]

[8] In *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 124 S. Ct. 27 (2003), the Second Circuit relied on a similarly mistaken policy justification for extending U.S. antitrust jurisdiction, opining that, if "plaintiffs affected only by the foreign scheme have no remedy under our laws, the perpetrator of the scheme may have a greater incentive to pursue both the foreign scheme and the domestic scheme rather than the domestic scheme alone." *Id.* at 403. Like the court of appeals here, the *Kruman* court failed to consider that the plaintiffs affected by the foreign scheme would have sufficient remedies in the countries where the conduct occurred and where the injuries were sustained.

The near-universal acceptance of an effects test, as described above, means that rarely, if ever, will a global conspiracy go unregulated and unpunished under other countries' competition laws. Similarly, the existence of such laws reflects the seriousness with which other nations take their responsibility to police activities that form the basis for an alleged worldwide conspiracy. This fact has been recognized on both sides of the Atlantic. The DOJ has attributed the increase in the number of international cartel cases to the efforts of the Antitrust Division and "other antitrust agencies in recent years." Delrahim, *supra*, at 9 (citation omitted).

Many of those cases are investigated by utilizing "positive comity" agreements, pursuant to which "the affected authority may request that the other initiate enforcement activities." Griffin, *supra*, 67 Antitrust L.J. at 183. Because it relies on diplomacy and not unilateral expansion of one nation's laws, "[p]ositive comity is intended to eliminate the long-running dispute concerning the propriety under international law of assertions of extraterritorial jurisdiction." *Id.* The United States and the EU have had a formal positive comity agreement in place since 1991, and in 1998 the two parties built upon that agreement with the Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, *reprinted at* 37 I.L.M. 1070 (1998). The Agreement states that among its purposes is to "[e]stablish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each Party will normally avoid allocating

enforcement resources to dealing with anticompetitive activities that occur principally in and are directed principally towards the other Party's territory." *Id.* at 1071. In the years since the 1991 Agreement was signed, "[e]nforcement officials on both sides of the Atlantic have confirmed that the flow of information between them has increased significantly." Griffin, *supra*, 67 Antitrust L.J. at 181 (noting, for example, that, in 1997 alone, "the U.S. antitrust agencies sent thirty-six notifications to Brussels and received forty-two from the Commission").[9]

The efficacy of those joint governmental efforts is evident in the investigation and punishment of the very vitamin cartel involved in this case. As petitioners noted in seeking a writ of certiorari, substantial penalties already have been assessed against the vitamin companies by countries outside of the United States, and there are pending private civil suits and class actions in a number of other countries. *See* Pet. 5; *see also* p.2, *supra*. In Belgium, a suit was brought against petitioner UCB S.A. and has since been settled. Such efforts are only part of a larger trend. Today, more than 100 countries have competition laws, marking a significant increase in the regulation of global antitrust issues. *See* H. Stephen Harris, *Competition Laws Outside the United States*, 2001 A.B.A. Sec. Antitrust L. 13. Germany's Federal Cartel Office alone investigated some 164 cartel or price-fixing cases in 2001

[9] Even in cases where a foreign nation rejects the United States' request for that government to intervene or prevent certain conduct, commentators have expressed the view that "we doubt the wisdom of using the United States antitrust laws to restructure a foreign country's domestic industry apart from extraordinary circumstances." IA Areeda & Hovenkamp, *supra*, ¶ 272g, at 356. Moreover, other commentators have noted that the expansive application of one nation's law may actually result in "systematic overregulation" and deterrence of even beneficial activities. *See* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 Geo. L.J. 883, 908 (2002) (noting that, where a government regulates all conduct in which it has any interest, "[a]n activity that harms one country will be prevented even if that harm is outweighed by the benefits enjoyed by other countries" and that this approach "prevents many welfare-increasing activities").

and 204 cases in 2002 – and those figures do not even include the numerous investigations the States of the German Federation conducted in those years. *See* Federal Cartel Office, *Biennial Activity Report 2001/2002*, at 274 (June 27, 2003) ("June 2003 Federal Cartel Report"), *available at* http://dip.bundestag.de/btd/15/012/1501226.pdf (German version only); *see also* II Fugate, *supra*, § 16.9, at 566 (commenting that "[t]he German Cartel Authority, with a large staff, vigorously enforces the statute"). Moreover, in 1999, the European Commission carried out investigations in 226 cases arising either from customer or competitor complaints, or from investigations raised on its own initiative. *See* European Comm'n, *Competition Policy in Europe and the Citizen* 13 (2000), *available at* http://europa.eu.int/comm/competition/publications/competition_policy_and_the_citizen/en.pdf.

Those efforts have produced a significant level of deterrence of competition law abuses. Subjecting companies to treble damages actions is unnecessary to achieve the desired deterrence and will, in fact, be counterproductive to ongoing enforcement efforts. *See* Ronald W. Davis, *International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15 Antitrust 53, 54 (Sum. 2001) ("in view of the spectacular growth of antitrust in Europe and elsewhere, international cartels are sufficiently deterred without the need to extend U.S. treble damage protection to all victims around the world"). *See also* Lambert, *supra*, 14 Loy. Consumer L. Rev. at 512 ("A private litigation-based system is not the only plausible system of ensuring compliance with the goals of the antitrust laws."). The court of appeals, however, adopted the mistaken view that international cartels can be sufficiently deterred only through expansion of U.S. extraterritorial jurisdiction to foreign plaintiffs who were affected only in foreign commerce.

III. IN EXPLAINING THE EXTRATERRITORIAL REACH OF THE FTAIA, CONGRESS OBSERVED SIMILAR CONCERNS ABOUT COMITY AND THE INTERESTS AND ENFORCEMENT EFFORTS OF FOREIGN NATIONS

The legislative history of the FTAIA reveals that Congress was motivated in the Act's passage by the same concerns that we emphasize here. Congress was aware, for instance, of the efforts other nations have undertaken to protect competition in international commerce, and it was aware of the interests other countries have in regulating their own industries and economies. Congress's awareness thus motivated it to enact the FTAIA to *limit*, and not expand, the application of United States antitrust laws so that it would reduce conflicts between U.S. regulations and policies and those of other nations. The court of appeals' opinion failed to take into consideration these indications of legislative intent when it construed the Act.

A. Congress Relied On The Existence Of Effective Antitrust Enforcement As A Reason To Enact The FTAIA To Limit Extraterritorial Application Of U.S. Antitrust Law

In passing the FTAIA, Congress observed that United States laws were not the only source of antitrust regulation. For example, the House Judiciary Committee Report on the FTAIA reported that "the committee recognized the increased sensitivity of other nations to antitrust considerations and cartel activity," and it explained that the FTAIA's more precise delineation of U.S. antitrust jurisdiction "in no way limits the ability of a foreign sovereign to act under its own laws" against cartels "having unlawful effects in its territory." H.R. Rep. No. 97-686, at 13-14 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498-99.

During the hearings on the FTAIA, testimony focused on the development of other nations' antitrust regimes and their impact on the scope of United States laws. It was emphasized that, even in cases where "American antitrust laws do not apply, it does not follow that antitrust principles do not apply," because "developments in foreign antitrust law in the last 10 or 15 years" meant that "we know that those laws are being enforced more vigorously." *Foreign Trade Antitrust Improvements Act: Hearing on S. 795 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 26 (1981) (statement of Robert Pitofsky). In acknowledging the development of other nations' competition laws, the testimony invoked familiar principles of comity and respect for foreign sovereigns. For instance, there was testimony that "[m]ore and more of our trading partners are enacting and enforcing their own restrictions," and that, by refraining from regulating foreign transactions, "we allow those foreign countries to decide what quality and level of competition they want to see within their borders" and avoid the United States' being charged with "'undue intrusion' and of 'exporting its economic values' to areas of the world where they are not especially congenial." *Id.* at 44. Likewise, it was observed that "a vast majority of countries" have enacted their own antitrust laws, and thus Congress was reassured that it could "feel a little more relaxed in leaving conduct unprotected by our own antitrust laws because it is likely to be" regulated by others. *Foreign Trade Antitrust Improvements Act: Hearing on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 79 (1981) ("House Hearing") (statement of John Shenefield, Partner at Milbank, Tweed, *et al.*).

In terms similar to those principles of international law that require respect for other nations' sovereign interests when determining the scope of extraterritorial jurisdiction, the legislative history explained that federal courts should "consider the defendant's nationality, the relative interests of the United States and other nations that are affected by the transaction, the location of the conduct, and similar factors." *Id.* at 109 (statement of Martin Connor, Washington Corporate Counsel for General Electric on behalf of the Business Roundtable).

B. Congress Was Sensitive To The Diplomatic And Political Ramifications Of Expansive U.S. Antitrust Jurisdiction

The testimony on the FTAIA also made it apparent that Congress was sensitive to the discord that overly expansive extraterritorial applications of U.S. law have created with its allies and trading partners. Representative Rodino, Chairman of the House Judiciary Committee, observed that passage of the Act meant that "[s]ome foreign animosity toward U.S. antitrust enforcement might also be eliminated, because the domestic-effects standard being proposed would limit the reach of our antitrust laws in a manner consistent with our major trading partners." House Hearing at 2 (statement of Hon. Peter Rodino). Other testimony similarly noted the "general consensus that U.S. antitrust law should not be obsessed by a missionary zeal to protect competition within foreign markets or protect competitive conditions in those markets," because an expansive application of U.S. law to transactions with effects in foreign nations had caused "political difficulties"; rather, that testimony emphasized the virtue of the FTAIA in "ameliorating the international political tension that now exists in the area of antitrust enforcement." *Id.* at 84 (statement of James Atwood). One statement summarized the political and diplomatic ramifications of an expansive application of U.S. antitrust laws:

> The creeping application of American antitrust to foreign-market effects adds to the perception of many foreign governments that United States law is an unguided missile, intruding into matters of principally foreign concern without adequate justification. Under the expansive interpretations of the Sherman Act . . . foreign plaintiffs would be able to invoke American antitrust to frustrate the local industrial or social policies of their home governments. By making clear that effects in foreign markets are the domain of foreign rather than American law, [the FTAIA] would put American practice in a more rational and diplomatically defensible mode. No other country attempts to regulate effects in foreign markets through the enforcement of its own antitrust law. . . . By clarifying and defining [the] allocation of enforcement responsibility, [the FTAIA] would held [sic] alleviate the heated extraterritoriality debate now in progress between the United States and its trading partners.

Id. at 91-93 (statement of James Atwood).

In expressing these concerns about avoiding diplomatic and political dissonance with other nations, the legislative history recounted many of the same differences between U.S. antitrust enforcement and the competition laws of other countries that we have emphasized. For instance, "[t]he combination of sanctions available in the United States, including criminal felony liability, parens patriae recoveries, class actions, and recovery of attorneys' fees," was "unparalleled" in international regulation, and "[t]hese gross disparities in economic systems raise fundamental questions of economic policy." *Id.* at 107 (statement of Martin Connor). The legislative history further reflected concern that other nations "have displayed growing hostility toward the extra-territorial reach of our antitrust laws" and that "[m]any nations have laws on their books that prohibit cooperation with U.S. antitrust authorities, interfere with U.S. antitrust prosecutions and defenses, and negate the operation of our laws in their territories." *Id.*

These concerns led to the conclusion that "there is no imperative that justifies any longer" U.S. regulation of "overseas consumers or foreign competitors." *Id.* Accordingly, "[r]espect for these differences in legal and economic systems requires not only that our laws be well-defined, but also that they not be overly expansive in their reach." *Id.* For those reasons, the FTAIA's jurisdictional reach had to be clarified – "we see no reason why our laws should reach out to regulate transactions whose primary effects occur outside of our territory." *Id.*

Moreover, Congress expressed its belief that a narrower, more-precisely defined sphere of U.S. antitrust jurisdiction would encourage other nations to further develop and enforce their own competition laws. As the House Judiciary Committee Report explained, "the clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets." H.R. Rep. No. 97-686, at 14, *reprinted in* 1982 U.S.C.C.A.N. at 2499. *See also* House Hearing at 85 (statement of James Atwood) (leaving the enforcement of transactions with foreign effects to other nations "will encourage the development of foreign antitrust programs that will be similar to ours" and "will bring about over time a better, clearer, more effective regime of antitrust cooperation across borders"); *id.* at 92-93 (noting that enacting FTAIA "would make clear to foreign governments that the protection of competition within their home markets is their responsibility, not the responsibility of the United States," and thus that the Act "is an invitation to our trading partners to strengthen and develop their *own* antitrust programs"); *id.* at 94 (FTAIA "should serve as an invitation for the further development of national antitrust programs in other countries" and "should serve in the long run to advance the cause of vigorous, competitive international trade").

IV. EXPANSIVE EXTRATERRITORIAL APPLICATION OF UNITED STATES JURISDICTION THREATENS TO UNDERMINE INTERNATIONAL COOPERATION AND GLOBAL ANTITRUST ENFORCEMENT

In analyzing the deterrence effects of its extension of United States antitrust laws to foreign plaintiffs, the court of appeals failed to consider the detrimental impact an expansive application of U.S. law would have on the cooperation that is vital to international investigation and prosecution of cartels and enforcement of judgments. The investigation and prosecution of global conspiracies in restraint of trade often depends upon the cooperation and

coordination of countries where the offenders might be domiciled or located. For that reason, the United States has entered into cooperative treaties or agreements with other nations, including the Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291. *See also* Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, 34 U.S.T. 388, T.I.A.S. No. 10365; Memorandum of Understanding as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, United States-Canada, *reprinted at* 4 Trade Reg. Rep. ¶ 13,503. *See generally* IA Areeda & Hovenkamp, *supra*, ¶ 275, at 411 n.6. Left unchecked, the court of appeals' decision threatens to undermine those efforts.

A. Foreign Concerns About U.S. Exercises Of Extraterritorial Jurisdiction Have Produced A Variety Of Counter-Reactions

Historically, other nations have bristled at extraterritorial applications of United States antitrust laws. These concerns have resulted in foreign governments taking a number of measures to counter what they perceive to be an illegitimate encroachment into their sovereignty. Such encroachments by U.S. courts invariably will alter the relationships between nations. The effectiveness of international treaties is threatened when other nations conclude that the U.S. has overreached in the application of its domestic laws to foreign conduct. *See* Buxbaum, *supra*, 26 Yale J. Int'l L. at 252. As Deputy Assistant Attorney General Delrahim has stated, "the more that the conduct of foreign businesses in foreign countries becomes subject to the regulatory effect of decisions by United States courts, the more our antitrust laws risk impinging inappropriately on the economic policies and sovereignties of foreign countries." Delrahim, *supra*, at 8. *See also id.* at 17 ("It is self-centered and ultimately self-defeating to set ourselves up as the world's antitrust policeman.").

German officials already have expressed concern about the court of appeals' expansive application of U.S. jurisdiction in this case. In a recent lecture given at an antitrust conference in Bonn and attended by United States and EU officials, former German Economic Minister (and recent chief German negotiator of the German-U.S. forced labor settlement) Otto Graf Lambsdorff commented on the *Empagran* decision. Mr. Lambsdorff opined that "American antitrust laws were created to protect the American consumer and not to regulate the competitive conditions in foreign countries," and he observed that "[a] German court – as well as every other European – would obviously deny jurisdiction" were the roles reversed, because "[a]ny other decision would rightly provoke protest by both US companies and the US government." Antitrust Law as a Regulatory Factor in a Globalized Market Economy, Lecture at the XI International Cartel Conference of the Federal Cartel Office, Bonn, Germany, at 3 (May 20, 2003) (hereinafter "Bonn Lecture").

One consequence of foreign disapproval with U.S. encroachments on other nation-states' antitrust enforcement efforts will be a refusal to enforce judgments obtained in U.S. lawsuits. "States have long maintained the right to refuse to give effect to judgments of other states that are based on assertions of jurisdiction that are considered extravagant." *Restatement (Third)* intro. note, at 304; IA Areeda & Hovenkamp, *supra*, ¶ 275, at 410 (noting an "impediment to effective remedies is that foreign law and foreign courts may assert priority with respect to behavior abroad, regardless of an American court's decree").[10] This

[10] *See also* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 29 (1987) (noting that "exorbitant assertions of judicial jurisdiction by United States courts may offend foreign sovereigns," "can provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields," and also noting that these assertions "can interfere with United States efforts to conclude international agreements providing for mutual recognition and enforcement of judgments or restricting exorbitant jurisdictional claims by foreign states") (footnotes omitted).

reaction, in turn, has its own consequences for international relations and diplomacy. *See* Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 Berkeley J. Int'l L. 44, 46 (2001) ("International tensions rise if foreign judgments are not recognized and domestic tensions rise if they are recognized in defiance of national values.").

In addition to refusing to enforce U.S. judgments, nations have enacted "blocking statutes" to protest U.S. transnational assertions of jurisdiction. *See* Joelson, *supra*, at 58. These statutes have taken several forms. For instance, "the Provinces of Ontario and Quebec have long had statutes prohibiting the removal of documents of Ontario and Quebec corporations pursuant to a foreign court order." I Fugate, *supra*, § 3.11, at 279. The United Kingdom, France, and Australia have similar laws. *See id.* at 279-80. Canadian officials have explained their objection to the United States' expansion of its antitrust jurisdiction: "For one government to seek to resolve [a policy] conflict in its favor by invoking its national law before its domestic tribunals is not the rule of law but an application, in judicial guise, of the principle that economic might is right." J.S. Stanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 Cornell Int'l L.J. 195, 213 n.46 (1978).[11]

These and other international reactions to the extraterritorial application of U.S. law should make apparent the

[11] Some countries have gone even further to "block" the extraterritorial reach of U.S. antitrust laws. In response to the treble damages allowed in private Sherman Act suits, for example, the United Kingdom enacted "a prohibition on the enforcement by United Kingdom courts of foreign judgments involving the award of multiple damages." A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 Am. J. Int'l L. 257, 257 (1981). That statute also provides a right of "claw-back" – *i.e.*, "a right for British citizens or businesses against whom foreign courts have awarded multiple damages to recover the noncompensatory element from the original plaintiff by an action in a United Kingdom court." *Id.* Canada has enacted similar legislation. *See* I Fugate, *supra*, § 3.17, at 309.

high stakes of this case.[12] If the court of appeals' unprecedented expansion of U.S. antitrust jurisdiction stands, more nations are likely to enact similar statutes in response to concerns about their nationals being subjected ever more frequently to the threat of treble damages and the burdens of U.S. court litigation. As a result, the court of appeals' judgment is likely to jeopardize international cooperation in the battle against cartels.

B. The Decision Below Impinges On Governmental Leniency Policies

International cooperation on antitrust enforcement is not the only area threatened by the court of appeals' decision. The investigation, prosecution, and deterrence of international cartels through the DOJ's corporate leniency program has been effective, and it is far less offensive to principles of international law, comity, and foreign sovereignty than are private antitrust suits in U.S. courts. As the International Competition Policy Advisory Committee ("ICPAC") reported in 2000 to the Attorney General and Assistant Attorney General for Antitrust, international enforcement through these policies "has occurred without offending the sovereign interests of other jurisdictions to the same degree that can arise in the context of extraterritorial enforcement. Some of the persistent concerns associated with international enforcement are sidestepped

[12] In the trade area, EU institutions are drafting a regulation against the Anti-Dumping Act of 1916, 15 U.S.C. § 72, which prohibits the selling at below cost of products with the intent of destroying or injuring a United States industry. Application of that law can have significant extraterritorial effects. *See, e.g., Goss Graphic Sys., Inc. v. Man Roland Druckmaschinen Aktiengesellschaft*, 139 F. Supp. 2d 1040 (N.D. Iowa 2001). For that reason, the EU has taken strong exception and announced that it will pass a regulation seeking retaliatory and protective measures against the United States for failing to repeal the 1916 law that has been held to violate international trade law by the WTO. *See* EU Press Release, *EU seeks retaliatory and protective measures in US 1916 Anti-Dumping Act dispute* (Sept. 22, 2003), *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1274|0|RAPID&lg=EN&display=.

when a firm or an individual cooperates pursuant to a leniency policy, including issues of personal jurisdiction, service of process, and access to foreign-located evidence and individuals." ICPAC, *Final Report* at 184-85.

The court of appeals' decision threatens to undermine the DOJ's corporate leniency program as described by petitioners and the Solicitor General. *See* Pet. 8; Pet. App. 78a. It also could have detrimental consequences for similar programs in Germany, the EU, and other parts of the world. In discussing the EU's corporate leniency program, the EC has noted that "certain undertakings involved in . . . illegal agreements are willing to put an end to their participation and inform [the EC] of the existence of such agreements, but are dissuaded from doing so by the high fines to which they are potentially exposed." Official Journal of the European Communities, *Commission notice on immunity from fines and reduction of fines in cartel cases* ¶ 3 (2002/C 45/03). Because the "Commission considered that it is in the Community interest to grant favourable treatment to undertakings which cooperate with it," and similarly was of the view "that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value," it determined to "grant an undertaking immunity from any fine which would otherwise have been imposed" if certain conditions were met. *Id.* ¶¶ 4-8.

Germany, likewise, considers its leniency policies to be an important part of its enforcement efforts, and it already has enjoyed success with its program. In June 2003, the Federal Cartel Office reported to the German Parliament on its activities in 2001 and 2002 in the battle against cartels. That report noted that the leniency rule announced in April 2000 has "showed significant [positive] effect in the prosecution of cartels." June 2003 Federal Cartel Report at 45.

These leniency policies seek to balance the interests of disclosure, deterrence, and punishment. By contrast, the interests in disclosure and reform are greatly hindered

when a company risks the imposition of treble damages in a U.S. court for confessing to another nation or authority that it has participated in an international conspiracy. These disincentives become overwhelming when treble damages are made available not only to U.S. consumers, but also to all consumers around the world. At that point, the prospect of ruinous civil liability in U.S. courts far outweighs the benefits most companies would receive from participating in an amnesty program.[13] The court of appeals' decision gave insufficient consideration to these important factors when it expanded the scope of U.S. antitrust jurisdiction under the FTAIA. And the court failed to consider that its decision would actually hinder, not improve, deterrence of global conspiracies by jeopardizing international cooperation on antitrust enforcement. That erroneous judgment should be corrected by this Court.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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[13] *Cf.* Michael L. Denger & D. Jarrett Arp, *Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, 15 Antitrust 41, 42-43 (Sum. 2001) (detailing the exposure to significant antitrust civil liability that cooperating criminal defendants face).